Supreme Court, U.S.
FILED
JUL 6 1999
OFFICE OF THE CLERK

No. 98-1910

In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

WILLIAM ALLEN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to consider the ruling of the Pennsylvania Supreme Court in this case, which treats information that a suspect is carrying a gun as irrelevant to the reasonable suspicion analysis under *Terry v. Ohio*?

2. Does respondent's argument, that it is a correct reading of *Terry* to hold that a report of a gun is irrelevant, recommend denial of the petition for certiorari?

REASONS FOR GRANTING THE WRIT

Respondent asserts two reasons for denying the writ. First, he claims that the state court actually decided this case under the state constitution, not *Terry*. Second, he argues (somewhat inconsistently) that the state court correctly applied the *Terry* standard. Respondent's first argument is simply incorrect; his second actually calls for granting the writ.

1. This Court has jurisdiction: the state court never asserted an independent state ground, and expressly relied on *Terry*.

The Pennsylvania Supreme Court knows how to state an independent state ground; here it did not. Indeed, this Court recently reiterated the concept directly to that court.

In *Pennsylvania v. Labron*, 518 U.S. 938 (1996), as here, Labron's main argument was jurisdictional; the state court, he claimed, relied on the state constitution. This Court rejected that argument. Although it referred to state jurisprudence, the state court had made no "plain statement" that its numerous citations to federal authority were "being used only for the purpose of guidance, and d[id] not themselves compel the result[.]" 518 U.S. at 940-41.

Labron was decided on July 1, 1996, more than two years before the state court reached the instant case on February 26, 1999. The state court, therefore, obviously knows by now how to articulate an independent state ground. Yet it did not do so.

Instead, the ruling here expressly and repeatedly relies on *Terry* and cases decided under *Terry*. *Terry* is cited no less than four times by the state court, which also cites *Alabama v. White*, 496 U.S. 325 (1990) (applying *Terry*). Where state cases are cited, they are cases that expressly relied on *Terry*. *E.g.*, *Commonwealth v. Hicks*, 434 Pa. 153, 160, 253 A.2d 276 (1969). When the lower court cited *Commonwealth v. Melendez*, 544 Pa. 323, 676 A.2d 226 (1996), it added a parenthetical explaining that the relevant point in that case was based on *Terry* (appendix, 7). The lower court makes two references to the state constitution, but treats the state provision as coextensive with the Fourth Amendment (appendix, 10-11) (referring to "The Fourth Amendment to the United States Constitution *and* Article 1, Section 8 of the Pennsylvania State Constitution"; emphasis added). Indeed, the lower court punctuates the reference to the state provision with yet another citation to *Terry* (*Id.*, 10).

In point of fact, respondent does not even *argue* that the *instant* decision contains the required "plain statement." Rather, he argues that *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068 (1997), the state plurality decision that *let to* the idiosyncratic view of *Terry* embodied in the instant case, contained such a statement (brief for respondent, 7-8).

Respondent's point is a total non-sequitur. For purposes of jurisdiction, to assert that a state court relied on

an independent state ground in *another case* is simply meaningless.[1]

Moreover, if reference to other state decisions were relevant, it would have to be noted that the Pennsylvania Supreme Court has repeatedly held that, in the area of stop and frisk, the state constitution is entirely coextensive with the Fourth Amendment and with *Terry*. *Commonwealth v. Jackson*, 698 A.2d 571 (Pa. 1997); *Commonwealth v. Morris*, 537 Pa. 417, 422 n.3, 644 A.2d 721 (1994); *Commonwealth v. Hicks*, *supra*.

Jackson is particularly significant. In that case a majority of the Pennsylvania Supreme Court adopted the reasoning of the plurality in *Hawkins*; but in *Jackson*, the Pennsylvania Court expressly relied on *Terry*, and held that *Terry* controlled under the state constitution. 698 A.2d at 573 ("Pennsylvania has always followed *Terry* in stop and frisk cases").

Jurisdiction is not in issue here.

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[1] In fact, the supposed assertion of an independent state ground was apparently less than clear in *Hawkins* as well. The Florida Supreme Court later concluded that *Hawkins* was a persuasive application of the Fourth Amendment. *J.L. v. State*, 727 So.2d 204 (Fla. 1998).

This underscores the importance of this Court's "plain statement" requirement. The alleged assertion of a state ground in *Hawkins* was so unclear, and so "interwoven with the federal law," *Labron*, 518 U.S. at 941, that it was read as an authoritative statement of *federal* law by another state court. State courts cannot be allowed to each place their own gloss on the federal constitution, while avoiding review by making ambiguous reference to their own constitutions.

2. Respondent's alternative position is actually an argument *for* granting the writ.

Though he insists that the state court did not purport to follow *Terry*, respondent argues in the alternative that it applied *Terry* correctly.

Petitioner will not debate the question here; it is sufficient to note that the question warrants debate. Indeed, if respondent is correct, the overwhelming majority of states and federal circuit courts that have adopted a view of *Terry* opposite to that of respondent and the supreme courts of Pennsylvania, Florida, and Massachusetts, are all terribly wrong. (*See* petition for certiorari at 12-15, collecting cases). Given respondent's position, grant of the writ is all the more imperative to address this alleged massive misapplication of the Fourth Amendment.

The writ should therefore be granted.

CONCLUSION

Wherefore, the Commonwealth of Pennsylvania respectfully requests this Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,

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